

# LEEWAY FOR JUDICIAL USURPATION: IGNORING THE DEFAULT OF THE ELECTIONS CLAUSE IN *THE TEXAS REDISTRICTING CASES*

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<sup>\*</sup> Author's note.

## I. INTRODUCTION

In an address to the House of Commons, Winston Churchill once said, “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”<sup>1</sup> His words are just as true today as they were in 1947. With negative television ads, smear campaigns, and politically motivated lawsuits, the state of American democracy may seem bleak. Regardless of these unfortunate practices, one of democracy’s best attributes remains intact; it is a recursive system. Even when democratic politics is at its most despicable levels, the people still possess the power to change the system and remove the offending party from office. This too is applicable to partisan gerrymandering.<sup>2</sup> If the practice is offensive to a majority of the voting population, new representatives will be elected, notwithstanding the egregious shapes that are created by the gerrymandering process.<sup>3</sup> Democracy’s recursive nature combined with our systems of federalism and separation of powers – both at the state and federal level – make gerrymandering for political purposes an intelligent practice only if it is used to a point that is tolerable by voters.

The Supreme Court has had a difficult time in deciding how to handle the issue of partisan gerrymandering, a legislative procedure practiced since our nation’s founding. Oscillating in the past half century, they have

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<sup>1</sup> CHAMBERS DICTIONARY OF QUOTATIONS 265 No. 32 (Alison Jones ed., Chambers 1997).

<sup>2</sup> Gerrymandering is a noun meaning “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” Its etymology comes from the combination of Governor Elbridge “Gerry” and “salamander” after an election district created when Gerry was governor of Massachusetts. BLACK’S LAW DICTIONARY 708-9 (8th ed. 2004).

<sup>3</sup> The optimum shape for a district is a circle because it is the most compact of shapes. To determine how much a district is gerrymandered, an equation must be calculated to determine how much it deviates from a circle: The area of the district is divided by pi, and then the square root of that quotient is found to determine what the radius of the district would be *if* it was a circle. That radius is multiplied by 2 and pi to determine what this hypothetical circle’s circumference would be. The district’s actual circumference is divided by the hypothetical circumference to find its deviation. If this final quotient were 1, it would be perfect, and as it increases above 1, it suggests more gerrymandering. By running a district through a Geographic Information System program, its area and circumference can be found, and then if the equation is performed, its gerrymandering quotient can be determined. Two of the most gerrymandered districts are Florida’s 3<sup>rd</sup> District represented by Representative Corrine Brown (D) with a quotient of 4.59 and Georgia’s 11<sup>th</sup> District represented by Representative Phil Gingrey (R) with a quotient of 5.34. See *infra* Appendix pp. 1-2.

ruled non-racial gerrymandering as both nonjusticiable and justiciable, but never with an agreement to a standard of unconstitutionality.<sup>4</sup> Lower courts have struggled to apply the Court's confusing decisions pragmatically and have been forced to nearly always dismiss such cases,<sup>5</sup> but debate continues as to whether courts should be addressing this issue at all. Some argue that the Constitution expressly leaves congressional districting to the state legislatures and Congress, with absolutely no role for courts; while others claim judicial review and other legal and political developments allow courts to intervene in the redistricting process.<sup>6</sup>

At issue is the Elections Clause of the Constitution.<sup>7</sup> Either this clause is a manifest declaration that redistricting is principled in federalism and separation of powers, foreclosing judicial activity, or the clause and subsequent constitutional amendments permit court action in the redistricting process. The first theory leaves congressional districting to the elected branches of government as a nonjusticiable political question, while the second has several theories for a judicial role, such as First Amendment protections, Equal Protection rights, or Guarantee Clause requirements.<sup>8</sup> It is clear that racial gerrymandering is both an Equal Protection Clause and a Fifteenth Amendment violation,<sup>9</sup> but the constitutionality of districting based on political party identification remains in limbo.<sup>10</sup>

When the Supreme Court decided *The Texas Redistricting Cases*, it only added to the confusion.<sup>11</sup> While three justices held that the issue of justiciability was not to be revisited, two did not take a position on the issue

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<sup>4</sup> Compare *Davis v. Bandemer*, 478 U.S. 109 (1986) (holding political gerrymandering cases properly justiciable under the equal protection clause), with *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding by plurality that political gerrymandering cases are nonjusticiable).

<sup>5</sup> See *Vieth*, 541 U.S. at 280 nn.5-6 & 8.

<sup>6</sup> See *infra* Part II.B.

<sup>7</sup> The Elections Clause reads, "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1.

<sup>8</sup> Guarantee Clause challenges to redistricting plans have consistently been held nonjusticiable political questions; therefore this Note will not offer this argument for dispute. *Baker v. Carr*, 369 U.S. 186 (1962); see also *Luther v. Borden* 48 U.S. (7 How.) 1 (1849) (refusing to hear case where legitimacy of the Rhode Island government was challenged under the Guarantee Clause). See generally U.S. CONST. art IV, § 4.

<sup>9</sup> See *Reynolds v. Sims*, 379 U.S. 870 (1964); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>10</sup> While this Note contends that all districting schemes are nonjusticiable political questions, the focus of the discussion will be on congressional districting schemes because the Elections Clause in the Constitution specifically governs these.

<sup>11</sup> *League of United Latin American Citizens v. Perry (The Texas Redistricting Cases)*, 126 S. Ct. 2594 (2006).

because they claimed it had not been argued, two stated explicitly that it was justiciable, and two held that it was not.<sup>12</sup> This was a missed opportunity to resolve an important question in American politics and law, and the Court should have held that non-racial gerrymandering is a “political question.”<sup>13</sup> While the holding was correct, the plurality opinion with its multiple concurrences and dissents produce no clear guidance for future cases; strictly applying a standard that political gerrymandering cases are nonjusticiable is a better standard.

Part II will provide the background on the practice of political gerrymandering. It will explain its history and development, state arguments for and against it, and suggest what role is proper for courts in this area. Part III describes the Elections Clause; including its formation during the Constitutional Convention, its implementation by the state legislatures and Congress, and its interpretation by the U.S. Supreme Court. After analyzing the relationship between the Elections Clause and the practice of gerrymandering by state legislatures (and regulation thereof by Congress) throughout American political history, a clearer baseline for proper judicial involvement should become more evident. Part IV will explain an exception to the Election Clause’s default position that requires court action in gerrymandering, i.e. racial motivations in districting. Part V demonstrates that although the Fourteenth and the Fifteenth Amendments require court supervision of racial gerrymandering, this is not comparable to purely political gerrymandering. The Court ignored its prior rulings on this issue when it began adjudicating partisan gerrymandering claims, ignoring the default position of the Elections Clause. A lack of any proper judicial role is further shown by the Court’s inability to adequately articulate a manageable standard to adjudicate the perceived problem, which is required to exclude such issues from being qualified as a political question.<sup>14</sup> Part VI is an analysis of *The Texas Redistricting Cases*, in which the Court provided no further guidance to state legislatures, Congress, or lower courts on how to handle the issue of political gerrymandering. The flaws of its reasoning will be demonstrated along with examples of why judicial involvement is unnecessary. Part VII forecasts the effects of *The Texas Redistricting Cases* on state legislatures, and suggests ways those bodies, Congress, and lower courts can mitigate the holding of the case.

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<sup>12</sup> *Id.*

<sup>13</sup> Something is a political question, and therefore nonjusticiable, if it meets any of the following descriptions: the Constitution’s text commits the issue to another governmental branch, a judicially discernable standard does not exist, a nonjudicial policy determination must be made, a decision would be disrespectful to another branch, finality is needed to an already made political decision, embarrassment could result from conflicting pronouncements. *Baker*, 369 U.S. at 217.

<sup>14</sup> *Id.*

## II. POLITICAL GERRYMANDERING

### A. *Historical Perspective of Political Gerrymandering*

The practice of politicians creating their own legislative districts and attempting to influence the outcomes of elections with their designs has a long history in American politics.<sup>15</sup> Brought as a practice from England, colonial politicians were familiar with the importance of shaping districts for electoral advantage, i.e. gerrymandering. The phrase gerrymander was first coined in 1812, but the development of the practice in America began well over 100 years before.<sup>16</sup> The first known appearance of gerrymandered districts was in Pennsylvania during the formation of its colonial assembly districts in 1705. The city of Philadelphia was artificially excluded from Philadelphia County to weaken the former's political influence, thus creating the most prominent of colonial gerrymanders.<sup>17</sup>

After the Revolution, gerrymandering continued. One famous reported case (albeit disputed) is that of the attempt by Patrick Henry and his fellow Anti-Federalist's "unceasing efforts" to insure James Madison was defeated in his election to the First Congress in 1788.<sup>18</sup> Madison prevailed in his congressional election, but by then the Founders were well versed in gerrymandering, and "Washington, Madison, and Jefferson were not unacquainted with the possible results of a partisan districting law."<sup>19</sup> Partisanship reached a climax by 1812, the year the term "gerrymander" came into existence,<sup>20</sup> and by that year, there had been twelve cases of attempted or successful gerrymandered districting plans, nine of which involved congressional districts.<sup>21</sup>

The "Era of Good Feeling" followed the War of 1812, and partisanship was less intense, and gerrymandering became less frequent.<sup>22</sup> But, as cycles in American politics occur, after several decades the practice resumed. As one scholar puts it, "By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formulation of election districts. It was generally conceded that each

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<sup>15</sup> ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* (Chicago: Scott, Foresman and Company 1907).

<sup>16</sup> *Id.* at 26-28.

<sup>17</sup> *Id.* at 120.

<sup>18</sup> 2 WILLIAM C. RIVES, *HISTORY OF THE LIFE AND TIMES OF JAMES MADISON* 653-56 (Books for Libraries Press 1970) (1868).

<sup>19</sup> GRIFFITH, *supra* note 15, at 122.

<sup>20</sup> *Id.* at 122, 16-17.

<sup>21</sup> *Id.* at 121, 5-6.

<sup>22</sup> *Id.* at 123.

party would attempt to gain power which was not proportionate to its numerical strength.”<sup>23</sup> The first attempt to have an apportionment plan declared unconstitutional was unsuccessful, as the issue was held nonjusticiable.<sup>24</sup> Not until a later interpretation of the Fourteenth Amendment in *Baker v. Carr* were any arguments successful that redistricting was not a political question and thus justiciable.<sup>25</sup>

Technology may make gerrymandering more exact, and today’s climate of intense partisanship may make gerrymandering more intense, but the practice is as old as our country. There are times it occurs less frequently or abashedly, but gerrymandering is characteristic of American politics. In fact the Supreme Court has stated, “Politics and political considerations are inseparable from districting and apportionment.”<sup>26</sup>

### *B. Arguments For and Against Political Gerrymandering*

Passionate arguments are raised by pundits and scholars alike to the appropriateness of judicial action to curb partisan gerrymandering. Critics of political gerrymandering claim that the practice undermines and weakens our democracy or republican form of government, so therefore it is necessary for courts to intervene in the redistricting process.<sup>27</sup> They contend that partisan gerrymandering can crystallize the democratic process to such an extreme that elections become moot.<sup>28</sup> While those who disagree with the justiciability of the issue argue that courts are ill equipped to handle the political complexities of these cases.<sup>29</sup> To them, it is always more appropriate for the “elected branches” to have the sole authority in redistricting.<sup>30</sup>

### *C. The Proper Role of Courts in Congressional Redistricting*

Regardless of the inherent evils of purely partisan-motivated gerrymandering and the arguments for judicial intervention, the Constitution clearly states that the default position for authority on congressional redistricting is the Elections Clause. It is textually demonstrative that state

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<sup>23</sup> *Id.*

<sup>24</sup> *Colgrove v. Green*, 328 U.S. 549 (1946).

<sup>25</sup> 369 U.S. 186 (1962).

<sup>26</sup> *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (opinion by White, J.).

<sup>27</sup> *E.g.*, Jamal Greene, *Judging Partisan Gerrymanders Under The Elections Clause*, 114 YALE L.J. 1021 (2005);

<sup>28</sup> *E.g.*, Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993).

<sup>29</sup> *E.g.*, Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence*, 116 HARV. L. REV. 649 (2002).

<sup>30</sup> *E.g.*, Editorial, *DeLay’s Revenge*, WALL ST. J., June 29, 2006, at A14.

legislatures and Congress have jurisdiction over this process. Unless the Constitution has been amended in this aspect, courts have no role in this political process, and the test annunciated in *Baker v. Carr* – if applied properly – only reinforces this conclusion. The Framers of the Constitution were clear that the entity with the ultimate say of how candidates were elected to Congress was *Congress*, not the legislatures, nor the president or governors, and certainly not the courts.

Beyond the Constitution's textually demonstrable indication that Congress is to govern congressional districting, the Court has been unable to articulate a standard by which partisan districting can be found unconstitutional, and judicial involvement is nevertheless unnecessary. Politics in America is cyclical, and electoral paradigms shift and evolve to influence the effects of congressional districting.<sup>31</sup> Furthermore, after three attempts at resolving the issue, the disagreement between the Supreme Court justices has prevented any clarity and caused nothing but confusion.<sup>32</sup> Because of the Constitution's textual direction, the lack of any agreeable legal standard, and judicial involvement being unneeded, the proper role for courts in partisan gerrymandering is abstention.

### III. THE ELECTIONS CLAUSE: PROVIDING FEDERAL ELECTION LAW'S DEFAULT

During colonization, it was settled law in England that Parliament was the ultimate and sole authority in determining the methods in which its members were elected. Blackstone summarized this fact succinctly when he said, "It will be sufficient to observe, that the whole law of and custom of parliament has its original from this one maxim, that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."<sup>33</sup> This concept would become the model for how Congress would be regulated under the U.S. Constitution.

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<sup>31</sup> Since the Depression, there have been two instances where redistricting took a "full circle" in the states, eleven instances where redistricting took a "half circle" in the states, and sixteen instances where redistricting produced "conflicted results" in the states. This is measured only at reapportionment and the succeeding congressional election for states with more than one representative. *See infra* Appendix p.3.

<sup>32</sup> "Justice Kennedy's discussion of appellants' political-gerrymandering claims ably demonstrates that, yet again, no party or judge has put forth a judicially discernable standard by which to evaluate them (citation omitted). . . . Instead, we again dispose of this claim in a way that provides no guidance to lower-court judges and perpetuates a cause of action with no discernable content." *The Texas Redistricting Cases*, 126 S. Ct. 2594, at 2663 (2006) (Scalia, J., dissenting).

<sup>33</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES \*163 (internal quotation omitted).

### *A. The Framers' Intent*

The United States' first attempt at government formation came in 1781's Articles of Confederation. In the spirit of the Articles as a whole, the process of choosing members of Congress was left entirely up to state legislatures, which was archetypical of the Articles' failure to provide an adequate system of federal governance. In nearly all aspects of the confederation of the former colonies, including choosing members for the national legislature, states essentially retained their "sovereignty, freedom and independence" and no action could be taken unless nine states assented.<sup>34</sup>

Because of the underlying premise of state sovereignty guaranteed in the Articles, state legislatures were free to select any method of appointing delegates to the Congress and were able to recall them or replace them at any time.<sup>35</sup> The only restrictions placed on the selection of delegates was a basic set of term limits and a prohibition of a member from receiving compensation from the national government.<sup>36</sup> Article V made it explicit that the states were solely responsible for maintaining their delegates.<sup>37</sup>

By 1787, it was clear that the Articles of Confederation was a failure and a new agreement between the states was necessary. Many issues were debated during the Constitutional Convention that summer in Philadelphia, and the method of choosing members of Congress was one of them. The Committee of Details' first draft of the Constitution mentioned what would become the Elections Clause, but without any mention of who would have the ultimate authority over the electoral process.<sup>38</sup> Many minor alterations would occur, with the committee eventually recommending that the time, place, and manner of elections to each house would be controlled by state legislatures, but Congress could alter those.<sup>39</sup>

On August 9, the full convention took up the article for debate and possible amending, which produced what is essentially Article I § 4 of the U.S. Constitution. An attempt was made to make the article applicable only to the House of Representatives, but this failed by a ten to one vote, and the word "respectively" was added after "State,"<sup>40</sup> but the Committee of Style would later change "respectively" to "thereof."<sup>41</sup> The most contentious

<sup>34</sup> ARTICLES OF CONFEDERATION OF 1781, art. II; *id.* art. IX, cl. 6.

<sup>35</sup> *Id.* art. V, cl. 1.

<sup>36</sup> *Id.* art. V, cl. 2.

<sup>37</sup> *Id.* art. V, cl. 3.

<sup>38</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135 (Max Farrand ed., Yale University Press 1937) [hereinafter FARRAND'S].

<sup>39</sup> 2 *id.* at 155.

<sup>40</sup> 2 *id.* at 229.

<sup>41</sup> 2 *id.* at 592.



debate was over an amendment offered by John Rutledge and Charles Pinckney to strike “be altered by Congress” so as to make the state legislatures and not Congress the ultimate authority – essentially a debate over federalism.<sup>42</sup> The two South Carolinians were content with the freedom of selection mandated by the Articles of Confederation, but that document’s failures were the impetus for a stronger national government.

Proponents of Congress being the definitive authority over federal election law made several arguments for the rejection of the Rutledge-Pinckney amendment. Mr. Ghorum of Massachusetts argued that the amendment would be akin to giving the counties of England authority in the selection of members of Parliament. James Madison made it clear that not giving Congress the ability to control the selection process could lead to abuses by state legislatures, depriving “the people” with proper representation in the national government. While Mr. Morris of Pennsylvania, having more faith in the state governments, suggested elections could be unintentionally certified incorrectly, with no remedy available to the Congress.<sup>43</sup>

The Rutledge-Pinckney amendment was rejected, and afterwards the delegates gave Congress additionally authority by allowing it to not only alter, but also make regulations if state legislatures should refuse or fail to do so completely.<sup>44</sup> An exception was added to the clause providing that the place of choosing Senators remained under the sole authority of the legislatures. The section was then agreed to, and the convention adjourned for the day at 11:00 that morning.<sup>45</sup> It is clear from the day’s discussions that the Framers wanted Congress to have ultimate authority in deciding its membership selection process. Although the principle was grounded in federalism, the concept of judicial activity in the process – a separation of powers concept – would have been even more foreign to the Framers and rejected as the Rutledge-Pinckney amendment was.<sup>46</sup>

### *B. Congressional Acts*

Congress has taken little action in response to its ability to amend or

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<sup>42</sup> 2 *id.* at 240.

<sup>43</sup> 2 *id.* at 240-42. The English laws requiring Parliament to control its own elections supports Mr. Ghorum’s analogy. WILLIAM BLACKSTONE, 1 COMMENTARIES \*177 (“[The method of elections] is also regulated by the law of parliament....”).

<sup>44</sup> 2 FARRAND’S, *supra* note 36 at 242.

<sup>45</sup> 2 *id.* at 613; 2 *id.* at 229.

<sup>46</sup> As the ratification of the Constitution was being debated in the state legislatures, the federalism argument made by Rutledge and Pinckney continued, but the Founders were confident and insistent that the Elections Clause was correct in providing Congress as the ultimate authority in this area of the law. THE FEDERALIST NOS. 59, 60, 61 (Alexander Hamilton).

supersede state legislative redistricting policies, suggesting a faith in the propriety of state legislative action. The first federal legislation enacted under this authority was passed in 1842 and simply required representatives to be elected in districts.<sup>47</sup> Although this requirement was deleted from the 1850 Apportionment Act (allowing at-large elections), it was included in the 1862 statute.<sup>48</sup> Additional requirements for congressional districts - contiguity, compactness, and substantial population equality - were added to later apportionment acts, but all the requirements for congressional districts were absent from the law passed in 1929. Only in 1967 was the single-member district requirement restored by Congress, which is the current 2 U.S.C. § 2c.<sup>49</sup>

Congressional restraint from directing state legislatures on the process of choosing members for the House of Representatives demonstrates their belief that the former bodies are fully capable of establishing a fair and democratic procedure. Only eight acts of Congress have established or amended the requirements for procedures, and one of those permitted three requirements - contiguity, compactness, and substantial population equality - to expire.<sup>50</sup> It appears that Congress's only mandate for congressional districts is that they exist, forbidding states from electing their representatives at-large.<sup>51</sup> Besides the one requirement, state legislatures are freed by Congress to conceive of the other details in which redistricting takes place. Since the Elections Clause is a default provision, if Congress does not act under the clause, state law is supreme.<sup>52</sup>

State legislatures immediately utilized their initial authority to regulate the selection of congressional members, and many did so by implementing congressional districts within their states.<sup>53</sup> It is obvious that legislatures believed they possessed such power because of the Elections Clause, and the only other authority that allowed such actions was the tradition of districting for their own legislative bodies. It is evident that the Elections Clause provides such authority as its wording provides legisla-

<sup>47</sup> Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491 (repealed 1850).

<sup>48</sup> THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 117-21 (Johnny H. Killian & George A. Costello eds., U.S. Government Printing Office 1996) [hereinafter CONSTITUTION ANALYSIS]; *see also* 2 U.S.C.A. §§ 2-3 (2000).

<sup>49</sup> 2 U.S.C.A. § 2c (2000).

<sup>50</sup> *See* Wood v. Broom, 387 U.S. 1 (1932).

<sup>51</sup> Act of December 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified at 2 U.S.C. § 2c (2000)).

<sup>52</sup> *Foster v. Love*, 522 U.S. 67, 69 (1997).

<sup>53</sup> KENNETH C. MARTIS, THE HISTORICAL ATLAS OF POLITICAL PARTIES 1789-1989 at 70 (Macmillan Publishing Company 1989) (showing at the 1<sup>st</sup> Congress there were 11 states that had more than one representative, and seven of those elected their members in districts. Only Connecticut, New Hampshire, New Jersey, and Pennsylvania had at-large elections for multiple members).

tures access to all facets of electing members to the U.S. House of Representatives.<sup>54</sup>

### C. Judicial Gloss

The Supreme Court has provided few cases to determine its jurisprudence of the Elections Clause. Even fewer are applicable to the question of the justiciability of political gerrymandering cases, as it took the Court until 1879 to determine that Congress's regulations did indeed supersede state legislative actions when they were inconsistent - as the Framers intended.<sup>55</sup> The Court later explained that Congress could restrict state power by exercising its authority under the Elections Clause, although it has infrequently done so.<sup>56</sup> In essence, Congress can supplement state regulations or substitute its own, and has "supervisory power over the *whole* subject."<sup>57</sup>

The Court's first detailed examination of Elections Clause parameters was a challenge to an Illinois apportionment plan that lacked substantial equality of population amongst its districts.<sup>58</sup> It was clearly recognized that redistricting is embroiled in politics, and it would be improper for the judiciary to compel the legislative bodies to act in regards to these processes either through injunction or mandamus.<sup>59</sup> Although the appellants raised legitimate concerns of public harms, the Court made clear that by direction of the Constitution, such issues had to be remedied elsewhere.<sup>60</sup>

Furthermore, the judiciary has consistently held that Congress is supreme to state legislatures under the Elections Clause, and state governments cannot overstep congressional or constitutional mandates. Twice in the past two decades the Court has held state legislative actions unconstitutional regardless of claimed Elections Clause authority premised

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<sup>54</sup> The words "Times, Places, and Manner" answer the questions of "when," "where," and "how." All that is left to be answered is "who," "what," and "why." "What" is obviously voting, "why" is unanswerable, and "who" is covered by other sections of the Constitution. The Framers choice of words in the Elections Clause suggests they intended it to cover most aspects electoral regulation. U.S. CONST. art. 1, § 4, cl. 1.

<sup>55</sup> *Ex parte Siebold*, 100 U.S. 371, 383-86 (1879). *Contra* H.R. REP. NO. 28-60 (1st Sess. 1843) (recommending legislation be passed stating section 2 of the 1842 Apportionment Act requiring single-member districts is unconstitutional since several states had previously passed laws creating at-large elections for their members to the U.S. House of Representatives).

<sup>56</sup> *United States v. Classic*, 313 U.S. 299, 315 (1940); *see also supra* Part III.B.

<sup>57</sup> *Smiley v. Holm*, 285 U.S. 355, 367 (1932) (quoting *Siebold*, 100 U.S. at 387) (emphasis added).

<sup>58</sup> *Colegrove v. Green*, 328 U.S. 549 (1945).

<sup>59</sup> *Id.* at 544-55.

<sup>60</sup> *Id.*

on a lack of congressional actions. In *Cook v. Gralike*, the Court held that state legislatures do not have the power under the Elections Clause to require certain designations be placed beside the names of candidates. Actions such as these are violations of the Qualifications Clause and the First Amendment.<sup>61</sup> These cases did not involve the issue of justiciability of partisan gerrymandering cases, but held that state action can be held to constitutional scrutiny even if the state claims its authority is derived from the clause. States cannot cloak themselves from judicial intervention by describing an action as a regulation of “Times, Places and Manner of holding Elections for Senators and Representatives.”<sup>62</sup> If a legislative action is truly such a regulation, such as redistricting, it is a wholly separate matter.

Clearly, the pre-Civil War Elections Clause jurisprudence formulated congressional supremacy as to the regulation of the procedures in which U.S. representatives were chosen. At that time, state legislatures had default authority, Congress had overriding or supplemental authority, and judicial action was totally foreclosed. The process of redistricting was governed solely by the two former institutions.

#### IV. THE CIVIL WAR AMENDMENTS: PROVIDING EXCEPTIONS TO THE ELECTIONS CLAUSE

At the end of the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution to help remedy the blight of slavery from American democracy. These would provide the Supreme Court with the ability to interject itself into some aspects of the politics of redistricting, as was previously disallowed. Although judicial foreclosure in redistricting remains the constitutional default position, the entrenched inequities of racial discrimination provided exceptions.

##### *A. The Equal Protection Clause*

The Supreme Court took nearly 100 years before it entered the gerrymandering foray; first establishing the premise of one-person, one-vote to counter the practice of state legislatures diluting the voting power of minorities. The Equal Protection Clause of the Fourteenth Amendment permitted this necessary action, without which the default position of the Elections

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<sup>61</sup> 531 U.S. 510 (2001); *see also* U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (holding that a state law forbidding its members of the U.S. House of Representatives to serve more than a certain number of terms was a violation of U.S. CONST. art I, § 2, cl. 2, known as the “Qualifications Clause”).

<sup>62</sup> U.S. CONST. art. I, § 4, cl. 1.

Clause would have disallowed it.

In *Baker v. Carr*, the Court first announced that it had accepted the constitutional invitation to decide the propriety of districting schemes, previously holding that malapportionment challenges were a nonjusticiable political question.<sup>63</sup> The one-person, one-vote doctrine soon emerged from which the Court explained that,

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, wherever their occupation, whatever their income, and whatever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.<sup>64</sup>

The requirement was extended to both houses of state legislatures in *Reynolds v. Sims*, which held that the Alabama state senate's apportionment was an Equal Protection violation in those districts.<sup>65</sup> The analogy to the U.S. Senate was inadequate to allow unequal populations in any districts. More importantly, Chief Justice Warren demonstrated that the need for judicial action to implement equal population in districts was a result of vote dilution of minority voters and the lack of any other available remedy.<sup>66</sup> This injustice affected a protected class, i.e. race, and judicial action through strict scrutiny was the only means to end it.<sup>67</sup>

Congressional districts were placed under the one-person, one-vote requirement in *Wesberry v. Sanders*; marking the first time the judiciary directly inserted itself into what was previously a Congress/state legislature controlled field because of the Elections Clause.<sup>68</sup> Relying more on Article I § 2 of the Constitution as opposed to the Fourteenth Amendment, the Court explained that the House of Representative's creation was premised on equal voting strength. But, the Equal Protection Clause was the impetus for applying the principle to elections for the United States House of

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<sup>63</sup> 369 U.S. 186 (1962).

<sup>64</sup> *Gray v. Sanders*, 372 U.S. 368 (1963) (applying the doctrine to the Georgia Assembly).

<sup>65</sup> 377 U.S. 533 (1964).

<sup>66</sup> *Id.* at 568 (“The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as all races”); *id.* at 586-87 ([T]he action taken by the District Court in this case... was an appropriate and well-considered exercise of judicial power”).

<sup>67</sup> Partisan gerrymandering, as compared to racial gerrymandering, is also a historical practice, but other remedies exist to correct it; such as participating in primaries, working on campaigns, lobbying legislatures, and gubernatorial vetoes. Furthermore, party identification has never been held as a protected class and is a characteristic that changes amongst individuals.

<sup>68</sup> 376 U.S. 1 (1964).

Representatives, even if it was not the *Wesberry* Court's foundation.<sup>69</sup> There is no doubt that the clause could have been used to decide the case accordingly, but Article I § 2 provided a more "originalist" argument.<sup>70</sup>

These reapportionment decisions were controversial in the 1960s, but they have become an established part of American democracy.<sup>71</sup> The judiciary acted to create a more representative democracy and prevented further acts of racial discrimination in the political process. Racial minorities would have been unable to fully participate in elections without this action, which was permitted by the passage of the Fourteenth Amendment with its Equal Protection Clause. Elected officials were unlikely to correct the mistakes of malapportionment practices themselves, as it would have decreased their chances for reelection, creating a crystallization that is dissimilar to the effects of political gerrymandering.<sup>72</sup>

### B. The Fifteenth Amendment

In addition to the requirement that districts be equal in population, Congress and the Supreme Court have used the Fifteenth Amendment's mandate that voting rights cannot be abridged "on account of race, color, or previous condition of servitude" to scrutinize districting plans and prevent racial gerrymandering.<sup>73</sup> Gerrymandering is typically accomplished by "cracking," "packing," and "stacking" voting populations to reduce a segment of the population's overall electoral success.<sup>74</sup> This process has

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<sup>69</sup> *Id.* at 18-19 ("[Justice] Harlan has clearly demonstrated that both the historical background and language preclude a finding that Art. 1, § 2, lays down the *ipse dixit* 'one person, one vote' in congressional elections....I would examine the Georgia congressional districts against the requirements of the Equal Protection Clause of the Fourteenth Amendment.") (Clark, J., concurring in part and dissenting in part).

<sup>70</sup> Since this section of the Constitution was passed at the same time as the Elections Clause, it is arguable that it can inherently restrict it by requiring equal population in congressional districts. *Cf. Mahan v. Powell*, 410 U.S. 315 (1973) (holding that a dichotomy exists between legislative districting and congressional districting, as the former has more latitude for population differences as compared to the latter, which is premised on U.S. CONST. art. 1 § 2).

<sup>71</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 833 (Aspen Law & Business 2001).

<sup>72</sup> *See supra* note 31.

<sup>73</sup> The Fifteenth Amendment reads "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

<sup>74</sup> Cracking is separating and dispersing a concentrated group up into several districts to deny that group a majority in any of the districts. BLACK'S LAW DICTIONARY 395 (8th ed. 2004). Packing is concentrating a minority group into a minimum number of districts as a supermajority in those districts to limit their overall electoral influence. *Id.* at 1140. Stacking is combining a large group into a district with a larger opposition group. *Id.* at 1440.

consistently been used for partisan purposes, but the Fifteenth Amendment prevents such techniques with racial motivations.

Since the ratification of the Fifteenth Amendment, Congress has been the predominant force in enforcing its provisions, and the Supreme Court has not used it to invalidate a legislative apportionment plan.<sup>75</sup> It was during Reconstruction when Congress began enacting legislation under the amendment in order to bring former slaves into American politics as full participants. Several acts were passed during this era to make interference in elections a federal offense,<sup>76</sup> but the Supreme Court limited these provisions to federal elections.<sup>77</sup> The laws relating to election protections under the Fifteenth Amendment were eventually repealed once Reconstruction ended, leaving no enforcement provisions in place.<sup>78</sup>

In the 20<sup>th</sup> Century, both Congress and the Court have reestablished principles to enforce the Fifteenth Amendment and its mandate against racial gerrymandering. Laws were passed in 1957, 1960, 1964, 1965, 1968, 1970, 1975, 1980, and 1982 to prevent discrimination on account of race in all aspects of voting, including districting plans.<sup>79</sup> In *Gomillion v. Lightfoot*, the Supreme Court held that legislative redistricting plans could be a violation of the Fifteenth Amendment regardless of congressional actions.<sup>80</sup> Coming just prior to the formation of the one-person, one-vote principle, the Court realized judicial action was not only permissible, but also required to prevent racial discrimination from hindering minority-voting rights through reapportionment plans. These state actions were beyond the “political” arena and could be litigated.<sup>81</sup>

To rule that a plan is unconstitutional is difficult, as a violation only

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<sup>75</sup> *Paige v. Gray*, 437 F. Supp. 137, 148 (M. Ga. 1977) (citing *Beer v. United States*, 425 U.S. 130, 142 (1975) (holding city plan violative of the Fifteenth Amendment)) (explaining that most cases dealing with racial redistricting plans are scrutinized under the Fourteenth Amendment).

<sup>76</sup> The Enforcement Act of 1870, ch. 114, 16 Stat. 140 (repealed 1894) (providing for enforcement to protect the right to vote in federal elections); *see also* CONSTITUTION ANALYSIS, *supra* note 47, at 119.

<sup>77</sup> *Ex parte Yarbrough*, 110 U.S. 651 (1884) (holding laws relating to federal elections are proper under the fifteenth amendment and the elections clause); *see also* *United States v. Reese*, 92 U.S. 214 (1876) (holding Congress went beyond the fifteenth amendment’s scope in passing legislation relating to all elections).

<sup>78</sup> Act of February 8, 1894, ch. 25, 28 Stat. 36-37 (repealing all statutes relating to supervisors of elections).

<sup>79</sup> CONSTITUTION ANALYSIS, *supra* note 37, at 119 n.332; *cf.* 42 U.S.C. §§ 1971 to 1973ee-6 (2000) (codifying all federal voting rights laws). *See also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (renewing the Voting Rights Act in 2006 for another 25 years).

<sup>80</sup> 364 U.S. 339 (1960).

<sup>81</sup> *Id.* at 347.

occurs if the challenged scheme was designed to suppress minority voting strength, and refusing to maximize minority voting strength is not required.<sup>82</sup> Proportionality of electoral results is not guaranteed by the Constitution even for protected classes such as racial minorities.<sup>83</sup> Thus, districting plans can be a violation of the Fifteenth Amendment, but it is difficult to prove a breach, and the U.S. Supreme Court has never found one.

Because of the pattern of racial discrimination in American politics, the Supreme Court has found an exception to the Election Clause's default mandate. Judicial action can be taken to ensure that districts have equal population and race is not used as a factor in diluting voting strength. The Equal Protection Clause and the Fifteenth Amendment permit court intervention, and the Congress has expanded those protections by enacting the Voting Rights Act.<sup>84</sup> Without these constitutional invitations, court action would be foreclosed, and the Elections Clause directive that redistricting is a congressional and state legislative political decision would be absolute.<sup>85</sup> Slavery and racism required the exception to be established, but extreme partisan politics is incomparable to these injustices.

#### V. IGNORING THE ELECTIONS CLAUSE'S DEFAULT WITHOUT A PROPER EXCEPTION

Prior to 1986, the Court had always considered non-racial gerrymandering a nonjusticiable political question. It made this explicitly clear in *Colegrove v. Green*, which was premised on the Elections Clause giving Congress supreme authority over congressional districting.<sup>86</sup> Recognizing the Founders' desire that Congress control congressional membership procedures, the Court explained,

The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to

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<sup>82</sup> *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *cf.* *Thornburg v. Gingles*, 478 U.S. 30, 49-51 (describing the elements needed to establish a prima facie case of racially motivated vote dilution). *Compare* *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (holding that a discriminatory purpose must be proven to strike down a legislative districting plan) *with* 42 U.S.C.A. § 1973 (2003) (originally enacted as Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131) (requiring only a discriminatory effect must be shown).

<sup>83</sup> *Johnson*, 512 U.S. at 1017-21.

<sup>84</sup> U.S. Dep't of Justice, Introduction to Federal Voting Rights Laws, <http://www.usdoj.gov/crt/voting/intro/intro.htm> (last visited July 6, 2006); Jennifer Yachnin, et al., *Morning Business*, ROLL CALL (Wash., D.C.), July 20, 2006, at 3.

<sup>85</sup> *But see* U.S. CONST. art. I, § 2 (making the U.S. of House of Representatives fall within a stricter bound of the one-person, one-vote doctrine).

<sup>86</sup> 328 U.S. 549 (1946).



that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate.<sup>87</sup>

In *Davis v. Bandemer*, the Court reversed its position and decided that a purely partisan gerrymandering claim was justiciable, although it claimed to have decided the issue previously in *Gaffney v. Cummings*.<sup>88</sup> Its decision, that political gerrymandering cases were justiciable, was premised on a weak inference and a poor application of the *Baker* test. The decision provided lackluster justifications for this judicial insertion into what was previously a purely political question, and ignored the stare decisis of *Colegrove v. Green*. Furthermore, it created the confusion that was uncorrected in *The Texas Redistricting Cases*.

Justice White's first reason for deciding justiciability for these types of cases is because he mentioned partisanship in an equal protection claim in his opinion in *Gaffney*.<sup>89</sup> That case did involve a politically motivated gerrymander, but the justiciability issue was not directly addressed. The claim was premised on a one-person, one-vote argument, and the case was decided on that issue. Though equality of population was established to end racially motivated districting, and it was logical to extend it to all situations, it was incorrect to assume that this makes political gerrymandering justiciable. It begs the question to base the decision of *Bandemer* on this logic, and doings so is equivalent to deciding a case without adjudicating an underlying issue, and then saying the issue is resolved because the case was decided.

The other rationale used by Justice White for holding that political gerrymandering cases are justiciable was a weak and results driven application of the *Baker* test. He parallels political gerrymandering to racial gerrymandering, basing the former's justiciability on the latter's, without recognizing any manifest differences between the two.<sup>90</sup> Explaining how party identification, i.e. being a Democrat, Republican, or other party member, is a protected class in a way similar to race is not mentioned in the opinion. He recognizes that party identification is not immutable and has

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<sup>87</sup> *Id.* at 544.

<sup>88</sup> *Davis v. Bandemer*, 478 U.S. 109 (1986).

<sup>89</sup> *Gaffney v. Cummings*, 412 U.S. 735 (1973) (adjudicating a bipartisan, incumbent protection gerrymander that had less than perfect population equality in districts).

<sup>90</sup> *Bandemer*, 478 U.S. at 119. *But see supra* Part IV.B.5 (explaining the historical bias against racial minorities and their classification as a protected class).

not been subject to the same historical stigma that race has, but the similarities of the two to require justiciability are absent from the his discussion.<sup>91</sup>

It is true that *Baker* was an apportionment case, and that the one-person, one-vote rule did not arise until a few years later, but the Court then (and now) has been unable to formulate a “judicially discernible and manageable standard” for partisan gerrymandering.<sup>92</sup> The forecasts for such a standard by Justice White have failed to come to fruition. Furthermore, the requirement of fair representation as required by the one-person, one-vote standard is not comparable to what is referred to as “adequacy of representation.”<sup>93</sup> It appears that Justice White believes that having a voter’s chance of casting a *winning* vote as a member of a party is somehow as constitutionally necessary as a individual’s vote being counted equally. To the contrary, the Equal Protection Clause does not require proportional representation, but this is the logical extension of having “the same chance to elect representatives of [a political group’s] choice as any other political group.”<sup>94</sup>

*Bandemer* failed to justify partisan gerrymandering’s justiciability beyond *Gaffney*’s cursory involvement on the issue and a lax *Baker* test, but after *Bandemer* the floodgates were opened to similar claims. During this time, the “post-*Bandemer*/pre-*Vieth* era,” lower courts used *Bandemer*’s opinion to adjudicate partisan gerrymandering claims, and all but once ruling against judicial intervention.<sup>95</sup> The 18 years of attempted application of the standard produced only clarity in its error. As one scholar has explained, “*Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress.”<sup>96</sup>

In 2003, the Court revisited the issue of partisan gerrymandering’s justiciability and ruled in a plurality opinion by Justice Scalia that these case were political questions.<sup>97</sup> The holding was premised predominantly on a lack of a discernible standard to decide these questions. Justice Scalia explained that the presence of an unconstitutional intent to use race in

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<sup>91</sup> *Bandemer*, 478 U.S. at 119. See also *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2003) (citing *Bandemer*, 478 U.S. at 156 (O’Conner, J., concurring in the judgment)) (explaining the shifting and weak nature of political identification as compared to race).

<sup>92</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>93</sup> *Bandemer*, 478 U.S. at 124.

<sup>94</sup> *Id.* at 150 (O’Conner, J., concurring in the judgment) (“[B]ut it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation. And the Court’s decisions hold squarely that they do not.” (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 78-79 (1980) (plurality opinion))).

<sup>95</sup> See *supra* note 5.

<sup>96</sup> SAMUEL ISSACHAROFF, *THE LAW OF DEMOCRACY*, 886 (Foundation Press rev. 2d ed. 2002).

<sup>97</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

redistricting schemes coupled with discriminatory effect against minorities is judicially measurable.<sup>98</sup> Not so with discriminatory intent and effect against a person based on political party identification in the course of legislative districting. Only four justices agreed that partisan gerrymandering was totally nonjusticiable in *Vieth*, so the issue was not entirely resolved and left open the possibility of it being revisited once again.<sup>99</sup> Indeed, lawsuits would continue to be filed claiming discrimination by partisan redistricting plans, leading up to the litigation revolving Texas's mid-decade redistricting in 2003.

## VI. THE TEXAS REDISTRICTING CASES

### A. Facts

The circumstances of this case began with the reapportionment after the 1990 census. Since Reconstruction, Texas was dominated by the Democrat Party, but beginning in the late 1980s, the Republican Party began making a significant resurgence.<sup>100</sup> After the 1990 census, Texas was awarded three additional seats in the U.S. House of Representatives while the Democrat party controlled both houses of its state legislature and its governorship.<sup>101</sup> The redistricting plan that came out of the homogenic structure was heavily favorable for congressional Democrats and was described by nonpartisan political pundits as, "the shrewdest gerrymander of the 1990s."<sup>102</sup> Lawsuits were filed against the plan, but the 1992 elections were held under the its districts resulting in 21 Democrats to 9 Republicans winning, but Democrats garnering only a 49.9% plurality of the statewide vote.<sup>103</sup> Throughout the 1990s, the Republican's statewide vote percentage continued to grow up to and beyond the 50% mark, but a majority of the State's representatives in Congress remained Democrats.<sup>104</sup>

By the time the 2000 census was completed, Texas's population had grown enough so that it was awarded two additional congressional seats. The Texas legislature that would control this reapportionment was compiled of a Republican majority in the state senate, but a Democrat majority in the

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<sup>98</sup> *Id.* at 293.

<sup>99</sup> *Id.* at 317 (Stevens, J., dissenting).

<sup>100</sup> Brief of State Appellees at 1, *League of United Latin American Citizens v. Perry (The Texas Redistricting Cases)*, No. 05-2604 (2006).

<sup>101</sup> MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 2000, at 1515 (National Journal 1999).

<sup>102</sup> *Id.*

<sup>103</sup> Brief of State, *supra* note 100, at 2.

<sup>104</sup> BARONE & UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 2000, at 1515.

state house of representatives.<sup>105</sup> The state legislature deadlocked in the process, and a three-judge federal panel was needed to construct the map. The court took a minimalist approach to not disturb the previous map and to protect incumbents, and the result was essentially a perpetuation of the 1991 Democrat gerrymander.<sup>106</sup> The 2002 election resulted in Republicans receiving 53% of the statewide vote for congressional elections, but Democrats winning 17 of the 32 seats.<sup>107</sup>

Under much controversy, the 78<sup>th</sup> Texas Legislature – composed of a Republican majority in both houses – passed a new congressional redistricting plan. It took two special sessions to be called by Governor Rick Perry (R) – while Democrat legislators fled the state – in order to pass Plan 1374C.<sup>108</sup> Hardly any one involved in the process hesitated to admit that the plan was intended to create a map where Republicans would compose a majority of Texas’s congressional delegation.<sup>109</sup> The result was an election in 2004 where Republicans won 21 of the 32 seats and obtained 58% of the vote in statewide races.<sup>110</sup> Before the 2004 election, but soon after Plan 1374C’s passage, appellants and other plaintiffs filed suit to have the map of 2001 reinstated.<sup>111</sup>

### B. Holding<sup>112</sup>

In a decision written by Justice Kennedy, the Court essentially held that partisan gerrymandering claims are not a political question, and those claims are justiciable. His reasoning was founded on Justice White’s reasoning in *Bandemer*, which in turn was founded on White’s assumptions in *Gaffney*. In regards to justiciability, Kennedy was explicitly joined by Justices Stevens, Souter, Ginsburg, and Breyer, and joined as to the disposition of the case by Chief Justice Roberts and Justice Alito. The latter two claimed that neither the appellants nor appellees had raised the issue; therefore they took no position on it. Justice Stevens, joined by Justice Breyer, wrote that the issue was justiciable, but did so in a separate opinion

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<sup>105</sup> MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2006, at 1575 (National Journal 2006).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Brief of State, *supra* note 100, at 8-9.

<sup>109</sup> Indeed, then-Majority Leader Tom DeLay, who was widely credited with orchestrating the 2003 redistricting, was quoted as saying, “I’m the majority leader, and I want more seats.” Lee Hockstader, *A Texas-Sized Brawl Over Redistricting*, WASH. POST, May 17, 2003, at A3.

<sup>110</sup> BARONE & COHEN, THE ALMANAC OF AMERICAN POLITICS 2006, at 1576.

<sup>111</sup> Brief of State, *supra* note 100, at 12.

<sup>112</sup> The Texas Redistricting Cases, 126 S. Ct. 2594 (2006).

with his own reasoning. Justice Scalia, joined by Justice Thomas, dissented to all aspects of the case, including the justiciability issue.

Once a majority of the Court found that partisan gerrymandering was justiciable, the confusion continued, but the result was a holding that the 2003 Texas redistricting plan was not a violation of the Equal Protection Clause. Justices Kennedy, Souter, Ginsburg, Alito, and Chief Justice Roberts agreed on this decision, while Justices Scalia and Thomas did not address it (since they argued the issue was nonjusticiable). Justices Stevens and Breyer dissented to this and argued that the plan was partially, if not entirely, a violation of the equal protection rights of Texas Democrats. The multiple opinions then went on to address alleged violations of the Voting Rights Act by the plan with a majority holding that the 23<sup>rd</sup> District was illegal. The result is Texas being partially redistricted to cure this Voting Rights Act violation.<sup>113</sup>

### C. Critical Analysis of the Court's Reasoning

#### 1. A Disingenuous Approach to the Underlying Issue

Justice Kennedy in writing his plurality opinion in *The Texas Redistricting Cases* assumes justiciability of the issue of political gerrymandering cases. He fails to state exactly why these types of cases are justiciable, and no *Baker* test is done to determine if any of its six elements are present.<sup>114</sup> The opinion does investigate whether a reliable standard for adjudicating equal protection claims is offered by appellants, and concludes that one is not. The fact that the Texas plan in question was enacted mid-decade does not offend the Fourteenth Amendment's prohibition against discrimination or its one-person, one-vote requirement.<sup>115</sup>

Although this is a correct conclusion, it is an incorrect method, and only extends the assumptions of *Gaffney* and *Bandemer*. Before concluding that the appellants "state no claim on which relief may be granted," the Court should have first determined if this issue is justiciable and if the Constitution gives it authority to interject itself into such political issues.<sup>116</sup>

Furthermore, the Court makes no distinction as to state legislative districting plans and congressional districting plans.<sup>117</sup> Although most are

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<sup>113</sup> Since the Voting Rights Act is a congressional invitation for judicial supervision of redistricting plans, and the Fifteenth Amendment permits judicial review in racial gerrymandering cases, this note concedes *in arguendo* that this aspect of the case was correctly decided.

<sup>114</sup> *The Texas Redistricting Cases*, 126 S. Ct. at 2607.

<sup>115</sup> *Id.* at 2609-12.

<sup>116</sup> *Id.* at 2612.

<sup>117</sup> This Note claims both are nonjusticiable political questions, but acknowledges a

developed at the same time, the Constitution dictates directly to the latter in terms of giving state legislatures and Congress sole authority in regulating congressional elections. *Bandemer*, which first established justiciability of political gerrymandering cases, was a challenge to a state legislative plan and not a congressional plan.<sup>118</sup> *Vieth*'s plurality addressed a congressional districting plan, but held the entire scope of partisan gerrymandering claims as nonjusticiable.<sup>119</sup> Therefore, when the Court adjudicated the equal protection claims in the *Texas Redistricting Cases*, it was its first decision directly inserting itself into Congress's authority to self-regulate partisan gerrymandering, and the Court did so without recognizing the momentous step it was taking. The Elections Clause and *Colegrove v. Green*, which held congressional districting challenges as nonjusticiable, were ignored.

## 2. An Inability to Formulate a Measurable Standard of Unfairness

One of the *Baker* elements that must be present to establish justiciability is for the presence of a judicially manageable and discernible standard of adjudication.<sup>120</sup> Since *Bandemer*, and in *The Texas Redistricting Cases*, the Court has been unable to articulate a standard or find agreement amongst the justices to any of the many proposed standards. This inability to agree or discern a standard demonstrates partisan gerrymandering's nonjusticiability.

In *Bandemer*, the Court first attempted to articulate a standard for adjudicating such claims that was modeled off the racial gerrymandering standard.<sup>121</sup> This was an intent and effects test, but its difficulty in application was a result of the dissimilarities between race and party identification. Fourteen years later, when the Court nearly reversed itself in *Vieth*, its dissents were still unable to articulate a single, discernible standard to adjudicate these claims.<sup>122</sup> Justices Stevens, Souter, and Breyer each formulated standards, but all failed in determining when politics in districting is actually *too* much politics. In *The Texas Redistricting Cases*, the Court's opinion states that a presumption to invalidate mid-decade redistricting is improper, and after examining two other proffered standards, rebukes each of them as unworkable or overly constraining.<sup>123</sup> The result is

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distinction between the two based on the Elections Clause, which makes claims against congressional districting plans more nonjusticiable.

<sup>118</sup> *Davis v. Bandemer*, 478 U.S. 109 (1986).

<sup>119</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>120</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>121</sup> *Bandemer*, 478 U.S. at 127-43.

<sup>122</sup> *Vieth*, 541 U.S. at 317-68.

<sup>123</sup> *The Texas Redistricting Cases*, 126 S. Ct. 2594, 2609-11 (2006) (holding that both a "sole-intent" standard and a "symmetry" standard are unreliable).

more standards discussed, but a consistent inability for agreement on how to resolve such claims as required by *Baker v. Carr*.

The one-person, one-vote rule as articulated in *Gray v. Sanders* was announced soon after *Baker* and is characterized by its ease of application.<sup>124</sup> The Court has had 20 years since *Bandemer* to articulate a standard for partisan gerrymandering claims, and after contemplating at least five, none have been found effective. In addition, racial gerrymandering is a simple matter to adjudicate, especially because of race's status as a suspect class. Political identification is not such a class, but rather a fluid concept amongst voters, which has proven immeasurable in regards to unconstitutional discrimination. Furthermore, Congress has provided base standards to measure illegal racial gerrymandering in the Voting Rights Act,<sup>125</sup> but not so with partisan gerrymandering.

### 3. A Rejection of the Elections Clause's Default Position

Within *The Texas Redistricting Cases* there is little mention of the Elections Clause or its jurisprudence and history in American law. Because the Court in essence ignores this provision and its importance in congressional redistricting, it takes no deference to congressional acts or the decisions of state legislatures. Justice Kennedy mentions the clause in his preliminary discussion of the relation of the branches of government in regards to apportionment, but does not recognize that the Constitution has provided exceptions to the Elections Clause to allow courts to regulate only racial gerrymandering.<sup>126</sup> Doing so, he rejects the remaining default position of the Elections Clause and ignores the "textually demonstrable constitutional commitment" of this issue to Congress.<sup>127</sup>

The opinion's rejection of the default position of the Elections Clause also fails to realize that judicial intervention is unneeded for a variety of reasons. First, politics is circular as paradigms shift, and the democratic process is able to correct any extreme partisan gerrymandering plans over time.<sup>128</sup> Second, for partisan gerrymandering to be effective, it must make elections in districts closer by the packing and cracking process. The more these procedures occur, the closer elections become, and the more likely the gerrymandering plan will fail. This makes political gerrymandering a self-limiting procedure.<sup>129</sup> Also, if citizens are disgruntled by extreme

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<sup>124</sup> 372 U.S. 368 (1963).

<sup>125</sup> 42 U.S.C. § 1973 (2000).

<sup>126</sup> *The Texas Redistricting Cases*, 126 S. Ct. at 2608.

<sup>127</sup> *Baker v. Carr* 369 U.S. 186, 217 (1962).

<sup>128</sup> See *supra* Part I.A.

<sup>129</sup> See *Davis v. Bandemer* 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in the

gerrymandering practices of legislators (or the beneficiaries of these plans, i.e. U.S. Representatives) an anti-incumbency mood can influence the electorate, and these politicians will be defeated in the next elections. In American democracy, voters tend to vote for individuals and not party representation; therefore in most regions incumbents are never perfectly safe simply because of their party identification, and in other regions one party is highly predominant at all levels of government because of the behavior and choice of that electorate.<sup>130</sup> Furthermore, governors in most states possess veto power of redistricting legislation,<sup>131</sup> so if the controlling party in the legislature that is attempting to gerrymander in its favor is actually the state's minority party, then the governor will likely be in the majority party and can veto an extreme plan. All of these reasons demonstrate that it is systematic of a democracy to correct extreme partisan gerrymandering, and judicial action is unnecessary.<sup>132</sup>

By ignoring the default position of the Elections Clause, the Court demonstrates a lack of faith in the democratic process and interjects the least democratic branch of government into what is truly a political question. This is in essence “expressing lack of the respect due” to Congress as the ultimate authority under the Constitution to regulate the elections in which its members are chosen.<sup>133</sup>

## VII. CONCLUSION

While the holding of *The Texas Redistricting Cases* was correct, the opinion produced no clear guidance for future cases. The Court should have held that political gerrymandering cases are nonjusticiable political questions.

### A. *The Effects on State Legislatures and Possible Solutions*

Because of the decision in *The Texas Redistricting Cases*, state legislatures face two seemingly contradictory effects. First, since the Court

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judgment) (explaining the electoral risks involved in political gerrymandering and the potential for “disaster” in an “overambitious” plan).

<sup>130</sup> JERROLD G. RUSK, A STATISTICAL HISTORY OF THE AMERICAN ELECTORATE 510-515 (CQ Press 2001). See generally *id.* at tbl.8.6 (demonstrating the evolving patterns of party identification in some regions over time and entrenched party identification in other regions).

<sup>131</sup> NAT'L COUNCIL OF STATE LEGISLATURES, STATE REDISTRICTING PROFILES 2000, at ix (1999).

<sup>132</sup> GRIFFITH, *supra* note 15, at 123 (“Public sentiment does much to defeat the end attempted by the gerrymander.”).

<sup>133</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).



implicitly ruled that such cases are justiciable, it is likely that nearly all of their districting plans – whether decennially or mid-decade – will be challenged in courts. The Voting Rights Act causes litigation as well, but it is congressionally mandated supervision and courts have a clearer standard for resolving such issues.<sup>134</sup> No clear standard can be formulated by the Court to resolve partisan motivated gerrymandering, but this inability will not prevent lawsuits. Second, the Court's inability to articulate a standard will cause lower courts difficulty in adjudicating such claim. But, because egregious partisan gerrymandering was held constitutional in *Bandemer*, *Vieth*, and *The Texas Redistricting Cases*, lower courts will likely dismiss future lawsuits. This likelihood will not prevent suits from being filed as a proper holding in *The Texas Redistricting Cases* would have accomplished.

To aid state legislatures in preventing judicial scrutiny of their districting plans, they should utilize one or more of the variety of options at their disposal. The most drastic choice is all encompassing and would cure the process of any partisanship; that is to remove the process from the legislature. A variety of states have established commissions to handle the entire process that are composed of members of both parties and usually independents.<sup>135</sup> These commissions act similarly to the three-judge panels used in federal court, but state legislatures, or citizens through ballot initiatives, have approved the process, creating self-denial of partisanship. Redistricting commissions are likely a popular method of foreclosing judicial activity, and it is an example of democracy's recursiveness limiting an alleged flaw.

A less drastic, but also a less certain way to prevent adjudication of political gerrymandering cases is for state legislatures to impose requirements of the districts they create.<sup>136</sup> Challenges could still be brought under the Fourteenth and the Fifteenth Amendments in federal court, but requirements such as contiguity and compactness would lessen partisan effects of districting plans. Predetermined and specific criteria for districts would make adjudicating cases simpler and easier to dismiss. Self-imposing districting criteria would provide a more democratic resolution to the supposed problem, as compared to unrestrained judicial intervention.

#### *B. Ways for Congress to Foreclose Judicial Action on Gerrymandering Cases*

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<sup>134</sup> 42 U.S.C. § 1973 (2000).

<sup>135</sup> NAT'L COUNCIL OF STATE LEGISLATURES, REDISTRICTING LAW 2000, at 137-38, 143-45 (2000).

<sup>136</sup> See *id.* at 146-89 (describing each state's principles that are legally required in their redistricting plans).

Like state legislatures, Congress can take actions that will prevent courts from adjudicating political gerrymandering claims. It could take actions similar to those described *supra* by legislatures to reduce the amount of partisanship in the process. The Elections Clause makes Congress supreme on such matters, so mandating plans be drafted and approved by a commission is certainly an available option, which would have the same effect and benefits as if state legislatures had done so themselves.<sup>137</sup>

Creating standards, unless done precisely and finitely, would not reduce federal court intervention or litigation. A vague standard such as “compact and contiguous” is not sufficiently finite, and such definitions would have to be determined through judicial interpretation. To reduce this effect, a definite permissible “gerrymandering quotient” should be established, thus making judicial enforcement simple and efficient.<sup>138</sup>

A more succinct way for Congress to preclude court action on partisan gerrymandering claims is to attempt to remove federal court jurisdiction. If allowed, a law preventing lower courts from hearing claims based on a constitutional challenge to partisan gerrymandering districts would also decide the issue of justiciability by democratic means. Congress would be acting under its constitutional authority to “ordain and establish” lower courts and make exceptions and regulations to Supreme Court appellate jurisdiction.<sup>139</sup> It is possible that the Supreme Court would rule such a law to restrict jurisdiction of political gerrymandering cases is also unconstitutional, but Congress should nevertheless attempt such an action.<sup>140</sup>

### *C. A Way for Lower Courts to Dismiss Gerrymandering Cases*

Without a clear standard for determining the constitutionality of districting plans that contain partisan intent and effects, lower courts are placed in the same scenario as they were during the “post-*Bandemer*/pre-*Vieth* era.”<sup>141</sup> Therefore, lower courts should dismiss all cases brought on this

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<sup>137</sup> See, e.g., Fairness and Independence in Redistricting Act of 2006, S. 2350, 109th Cong. (2006); Redistricting Reform Act of 2005, H.R. 4094, 109th Cong. (2005); Voter Choice Act of 2005, H.R. 2690 109th Cong. (2005); H.R. 830, 109th Cong. (2005).

<sup>138</sup> See generally *supra* text accompanying note 3.

<sup>139</sup> U.S. CONST. art. III, § 1; U.S. CONST. art. III, § 2, cl. 2.

<sup>140</sup> Compare *United States v. Klein*, 80 U.S. 128 (1871) (holding act of Congress removing appellate jurisdiction of the Supreme Court a violation of the separation-of-powers doctrine) with *Ex parte McCordle*, 74 U.S. 506 (1868) (holding Congress has the ability to remove Supreme Court appellate jurisdiction of cases) and *Felker v. Turpin*, 518 U.S. 651 (1996) (holding Congress can make exceptions to Supreme Court jurisdiction).

<sup>141</sup> See generally *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (describing the error in *Bandemer*’s faith in the possibility of a judicial standard for political gerrymandering).

issue as a result of *The Texas Redistricting Cases*' inability to formulate a clear standard. By simply explaining that no standard has been articulated and that no partisan redistricting plan has ever been held unconstitutional, lower courts should refuse to adjudicate any further political gerrymandering claims.<sup>142</sup> It would be inefficient and incorrect to do otherwise.

The only benefit to *The Texas Redistricting Cases*' holding is its demonstration that egregiousness partisanship in gerrymandering is likely constitutional. After the redistricting plans in Texas and Pennsylvania, it is hard to imagine an instance of political gerrymandering that can surpass the intent and effects of these schemes, especially since even racial gerrymandering plans have rarely been struck on purely constitutional grounds.<sup>143</sup> Regardless, the Supreme Court wasted a valuable opportunity to resolve this important issue and remove itself from an ever-present practice of American politics. Instead it has left the question unanswered and left open the possibility for judges to shape congressional membership, allowing the judiciary to supplant the text and intent of the Elections Clause.<sup>144</sup>

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claims being formulated in the future).

<sup>142</sup> Cf. *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal) (dismissing complaint for failure to state a claim for a constitutional challenge to a partisan gerrymander), *appeal dismissed*, 488 U.S. 804, *reh'g granted*, 488 U.S. 953 (1988), *aff'd*, 488 U.S. 1024 (1989).

<sup>143</sup> See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (holding a multi-member districting plan that was allegedly discriminatory was not a violation of the equal protection clause simply because racial minorities were outvoted in a district). But see, e.g., *White v. Regester*, 412 U.S. 755 (1973) (holding a multi-member districting plan coupled with historical discriminatory practices was a violation of the equal protection clause because the state actions invidiously excluded racial minorities from the electoral process).

<sup>144</sup> Cf. *Colegrove v. Green* 328 U.S. 549, 553-54 (1946) ("It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.") (opinion by Frankfurter, J.).